Supreme Court, U. S.
FILED
MAY 6 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1763

THE CHLORINE INSTITUTE, INC., et al.,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ERWIN N. GRISWOLD
PAUL M. DONOVAN
Attorneys for Petitioners

Of Counsel:

JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006

LA ROE, WINN & MOERMAN
Suite 743
1511 K Street, N.W.
Washington, D.C. 20005

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .. 3

STATEMENT 3

REASONS FOR GRANTING THE WRIT 8

1. The Decision Below is in Direct Conflict with Decisions of this Court and Decisions of Other Circuits 8
2. The Decision Below Decides a Serious Constitutional Question in a Manner Inconsistent with the Decisions of this Court 10
3. The Decision Below Presents Important Federal Questions Which Have Not Been, But Should Be, Settled by this Court 11

CONCLUSION 16

STATUTORY APPENDIX 17

CITATIONS

CASES:

American Trucking Assoc. v. *Frisco Transp. Co.*, 358 U.S. 133 ..... 12, 15

Bowman Transportation, Inc. v. *Arkansas-Best Freight System*, 419 U.S. 281 ..... 10, 11

Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 ..... 8, 9

Camp v. *Pitts*, 411 U.S. 138 15

Citizens To Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 ..... 2, 8, 10, 15

Page

Columbia Broadcasting System, Inc. v. *F.C.C.*, 454 F.2d 1018 8

Dry Colors Mfg. Ass'n Inc. v. *Department of Labor*, 486 F.2d 98 8

FPC v. *Texaco*, 417 U.S. 380 ..... 2, 8, 9

Hooker Chemicals & Plastics Corp. v. *Train*, 537 F.2d 620 8

ICC v. *Louisville & Nashville R. Co.*, 227 U.S. 88 10

Kurzon v. *United States Postal Service*, 539 F.2d 788.. 8

NLRB v. *Groendyke, Inc.*, 372 F.2d 137, *cert. denied*, 387 U.S. 932 8

NLRB v. *Metropolitan Life Ins. Co.*, 380 U.S. 438 8

Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294 14

Ohio Bell Telephone Co. v. *Public Utilities Comm'n*, 301 U.S. 292 11

Secretary of Labor v. *FMC Corporation*, 2 OSHC 3216 5

SEC v. *Chenery Corp.*, 318 U.S. 80 8

United States v. *Abilene & S.R. Co.*, 265 U.S. 274 11

United States v. *Midwest Oil Co.*, 236 U.S. 459 14

United States v. *Rutherford*, 442 U.S. 544 14

United States v. *Seatrain Lines, Inc.*, 329 U.S. 424 12

STATUTES:

Administrative Procedure Act

5 U.S.C. 553(b) 3, 5, 12, 13, 14

5 U.S.C. 706 ..... 3, 9, 10

Occupational Safety and Health Act of 1970

29 U.S.C. 651 *et seq* 3

29 U.S.C. 655(a) 3, 4, 7, 8

29 U.S.C. 655(b) 3, 4, 5, 11

29 U.S.C. 655(f) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

THE CHLORINE INSTITUTE, INC., et al.,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners The Chlorine Institute, Inc., *et al.* respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 613 F.2d 120, and is reprinted in the Appendix to this petition, *infra,* pp. 1a-10a. The orders of the Occupational Safety and Health Administration (OSHA) of December 8, 1978 (43 Fed. Reg. 57601), February 6, 1979 (44 Fed. Reg. 7140) and July 17, 1979 (44 Fed.

Reg. 41427) are reprinted, *infra,* pp. 11a-19a, 20a-22a and 23a-26a respectively. The OSHA denial, dated September 13, 1979, of The Chlorine Institute's motion for stay pending judicial review is reprinted, *infra,* pp. 27a-32a. The order of the court of appeals denying petitions for reconsideration is reprinted, *infra,* pp. 35a.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1980, *infra,* pp. 33a-34a. On March 21, 1980, timely petitions for rehearing were filed. On April 7, 1980, the court of appeals denied the petitions for rehearing, *infra,* p. 35a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an administrative agency order may be upheld on the basis of post hoc rationalizations and findings made by the agency after the final order was issued.

2. Whether the decision below upholding the order of OSHA on the basis of such post hoc rationalizations and findings is in conflict with this Court's decisions in *FPC* v. *Texaco,* 417 U.S. 380, and *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, and numerous other decisions both in this Court and in several of the circuits.

3. Whether the use of evidence by an administrative agency in a way that forecloses an opportunity to offer a contrary presentation violates the essence of a fair hearing, and thus is contrary to the due process clause of the Fifth Amendment, so that a reviewing court cannot properly rely upon agency evi-

dence presented two months after the final agency order.

4. Whether an administrative agency may change a long-standing and legally binding regulation without rulemaking by asserting that the regulation was erroneously promulgated, and, if so, what burden of proof must the agency carry in showing that the change is a correction of an error and not a change in policy.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The statutory provisions involved are Title 5 United States Code §§ 553 and 706, and sections 6(a), 6(b), and 6(f) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655(a) (b) and (f)). These provisions are set forth in the Statutory Appendix hereto *infra,* pp. 17-26.

STATEMENT

This case involves the validity of actions of the Secretary of Labor in changing the regulations governing occupational exposure to chlorine, without rulemaking procedures, some seven and one-half years after their promulgation.

The Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*) became effective on April 28, 1971. Section 6(a) of the Act (29 U.S.C. 655(a)) authorized the Secretary of Labor to promulgate as an

occupational health standard "any established Federal standard" without rulemaking, but only during the two year period following the effective date of the Act. After the two year period, any modification of an existing standard may be promulgated only by following the rulemaking procedures of Section 6(b) of the Act. (29 U.S.C. 655(b)).

At the effective date of the Act, there were two different established Federal standards for chlorine. One standard was one part of chlorine per million parts of air measured as an eight-hour time-weighted average (1 ppm, TWA), while the other was one part of chlorine per million parts of air measured as a ceiling (1 ppm, ceiling).[1]

On May 29, 1971, the Secretary of Labor promulgated occupational safety and health standards under Section 6(a) of the Act. (36 Fed. Reg. 10466 *et seq.*) Contained in those standards was a chlorine standard of 1 ppm, TWA conforming to one of the two differing established Federal standards. The involved standards, including the chlorine standard, were the subject of amendment on August 13, 1971 (36 Fed. Reg. 15101 *et seq.*), republication on October 18, 1972 (37 Fed. Reg. 22102 *et seq.*), and recodification on May 28, 1975 (40 Fed. Reg. 23072 *et seq.*). At no time, however, was the chlorine standard modified. During

---

[1] The time-weighted average (TWA) standard permits excursions above the 1 ppm limit provided they are compensated, or more than compensated, by concentrations below that limit during the workday. A ceiling limit is one that must not be exceeded at any time. Accordingly, it is possible to be in full compliance with a TWA standard and still violate a ceiling standard. On the other hand, a TWA standard may result in a lower aggregate exposure over a period of time.

this period, the Secretary of Labor cited at least one employer for violation of the 1 ppm time-weighted average standard. *Secretary of Labor* v. *FMC Corporation,* 2 OSHC 3216 (1974).

In May, 1976, the National Institute for Occupational Safety and Health (NIOSH)[2] forwarded to OSHA a "Criteria Document" recommending that the time-weighted average chlorine standard be changed to a ceiling standard at the 0.5 ppm level.

On December 8, 1978, without prior notice or opportunity for hearing, OSHA changed the chlorine standard from a time-weighted average to a ceiling, simply by publishing the change in the Federal Register. (43 Fed. Reg. 57601; 11a) In the Federal Register publication, it was stated that the time-weighted average standard had been erroneously promulgated in 1971. It was stated that the change was "essentially mechanical" and, therefore, notice and public procedures were unnecessary and impracticable within the meaning of 5 U.S.C. 553(b)(B). It was further stated that the change did not "establish, modify or revoke substantive rights and obligations" and, therefore, notice and public procedures under Section 6 of the Occupational Safety and Health Act were not required.

Following a number of comments, including those of The Chlorine Institute, OSHA, on February 1, 1979, issued an administrative stay (44 Fed. Reg. 7140; 20a) of the December 8, 1978 action. The Administrative Stay; Request for Comments had all the earmarks of

---

[2] NIOSH was established by Section 22 of the Act (29 U.S.C. 671) as an agency within the Department of Health, Education and Welfare, and was authorized to develop recommended safety and health standards.

an Advance Notice of Proposed Rulemaking. For example the notice stated:

> Interested persons are invited to submit written data, views, and arguments concerning the appropriate permissible exposure level for chlorine. Comments are also requested on the NIOSH recommendations, including the data relied upon in the criteria document. [44 Fed. Reg. 7141; 21a]

Since the NIOSH Criteria Document of 1976 was wholly irrelevant to the question of whether the chlorine standard was correctly or erroneously promulgated in 1971, the agency was apparently considering the subject generally, and not merely the question of the alleged error.

On July 17, 1979, OSHA lifted the administrative stay, and reimposed the ceiling standard for chlorine. (44 Fed. Reg. 41427; 23a) At no time in this order, or in any previous OSHA order, was it determined, or even suggested, that the time-weighted average standard was not adequately protecting workers, or that a ceiling standard would provide greater protection.

On July 20, 1979, The Chlorine Institute, *et al.*, filed a petition for review with the court of appeals, and on July 23, 1979, filed a motion with OSHA for a stay of its order pending judicial review. On September 13, 1979, OSHA, in a letter signed by an Assistant Secretary of Labor, and sent to Chlorine Institute counsel, denied the stay motion. (27a-32a) This letter, prepared nearly two months after the final agency action and after the commencement of appellate review, for the first time suggested that a ceiling standard pro-

vides greater protection for chlorine workers than a time-weighted average standard.

Not surprisingly, the OSHA brief to the court of appeals quoted and relied heavily upon the letter of September 13, 1979. The thrust of the OSHA position on appeal was that Section 6(a) of the Act (29 U.S.C. 655(a)) required the Secretary of Labor to promulgate the standard assuring the greatest protection to the employees; the letter of September 13, 1979 stated (without any hearing or other evidence to support it) that a ceiling standard would provide greater protection; hence, the Secretary of Labor must have erred in the promulgation of a time-weighted average standard, and should be permitted to correct the alleged error without notice or public procedure.

The court of appeals placed this case on its summary calendar, and without oral argument issued its *per curiam* opinion. (1a-10a) In its opinion, the court concluded that "[a]lthough difficult, it is not impossible to believe OSHA took over seven years to uncover an error such as this." (9a) The court went on to hold: "OSHA has found that ceiling limits provide greater protection than TWAs and the record discloses substantial evidence in support of this conclusion." (10a) There is, however, no such "finding" by OSHA in the administrative proceeding, and there was never any "evidence" on this issue. The "substantial evidence" cited by the court can only be the statement made in the letter of September 13, 1979, for there is no other evidence in the record on this subject. On this basis, the court affirmed the OSHA action.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is in Direct Conflict With Decisions of This Court and Decisions of Other Circuits.

The Fifth Circuit's decision is based upon arguments and rationalizations first advanced by OSHA counsel after commencement of review proceedings, and nowhere contained, or even alluded to, in any record before the agency, or in the agency orders under review. In this regard, the court's decision is in direct conflict with the decisions of this Court in *FPC* v. *Texaco,* 417 U.S. 380; *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402; *NLRB* v. *Metropolitan Life Ins. Co.,* 380 U.S. 438; *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156; *SEC* v. *Chenery Corp.,* 318 U.S. 80; and with the decisions of other circuits in *Kurzon* v. *United States Postal Service,* 539 F.2d 788 (1st Cir. 1976); *Hooker Chemicals & Plastics Corp.* v. *Train,* 537 F.2d 620 (2nd Cir. 1976); *Dry Color Mfrs.' Ass'n Inc.* v. *Department of Labor,* 486 F.2d 98 (3rd Cir. 1973); *Columbia Broadcasting System, Inc.* v. *FCC,* 454 F.2d 1018 (D.C. Cir. 1971); and *NLRB* v. *Groendyke, Inc.,* 372 F.2d 137 (10th Cir. 1967), *cert. denied,* 387 U.S. 932 (1967).

In its opinion, the court of appeals held (613 F.2d at 124; 9a-10a):

> The Secretary *asserts* that even if a conflict exists between the standards, OSHA is required to "promulgate the standard which assures the greatest protection." 29 U.S.C. § 655(a) (1976). OSHA has *found* that ceiling limits provide greater protection than TWAs and the *record* discloses substantial *evidence* in support of this conclusion. [Footnote reference omitted; emphases supplied.]

The OSHA assertion quoted above first appears in pleadings filed by counsel for OSHA as part of their argument in the court of appeals. The assertion was never articulated by OSHA in the proceedings before OSHA, and there is nothing in the OSHA orders on review that would even suggest that the so-called assertion played any part in the agency's reasoning process.

This Court has recently held "we cannot 'accept appellate counsel's post hoc rationalization for agency action'; for an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" *FPC* v. *Texaco,* 417 U.S. 380, 397, quoting from *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168-169.

While the reliance of the court of appeals upon the post hoc assertion filed in the court below by OSHA counsel constitutes serious error, reliance upon the OSHA "finding" that ceiling standards provide greater protection is even more unsupportable. The alleged OSHA finding, and the "substantial evidence" in the "record" supporting that finding, relied upon so heavily by the court of appeals do not appear in any proceeding before OSHA or in any OSHA order. Instead, they appear in a letter written to Chlorine Institute counsel denying an agency stay pending judicial review. This letter was written by an Assistant Secretary of Labor *after* the petition for review was filed in the court of appeals. Obviously, this letter written nearly two months after final agency action cannot be considered part of the record "compiled by the agency: the basis for review required by § 706 of the

Administrative Procedure Act." *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 419.[3]

If administrative agencies are to be permitted to construct "evidence" after final agency action, the reviewing standards of 5 U.S.C. 706 become essentially meaningless. The question deserves review by this Court.

2. The Decision Below Decides a Serious Constitutional Question in a Manner Inconsistent With the Decisions of This Court.

This Court has long held that administrative agencies cannot act upon their own information. *ICC* v. *Louisville & Nashville R. Co.,* 227 U.S. 88, 93. Parties must be given an opportunity to be "fully apprised of the evidence submitted or to be considered." *Ibid.* This is the essence of a fair hearing required by the Fifth Amendment.

In *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System,* 419 U.S. 281, 288 fn. 4, a unanimous Court recited the well-established rule of law:

> A party is entitled, of course, to know the issues on which decision will turn and to be apprised of

---

[3] While it may appear easy to jump to the conclusion that a standard of 1 ppm ceiling provides greater protection than a standard of 1 ppm TWA, that may not be true, and can hardly be decided without *any* evidence. A standard of 1 ppm ceiling allows continuous exposure of 1 ppm over an eight-hour period, while a standard of 1 ppm TWA may have a much lower average exposure for most of the period, while allowing (because of difficulties in the technological process) for brief intervals which may exceed the 1 ppm ceiling. Such brief intervals may or may not be harmful; and the lower average during the rest of the period may be beneficial. Surely these are matters for evidence, and not for post-hoc assertion by the agency, and assumption by the court below.

> the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation. *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U.S. 292 (1937); *United States* v. *Abilene & S.R. Co.,* 265 U.S. 274 (1924).

In this case, the court of appeals relied upon, as "substantial evidence" in the record, a letter written two months after the final agency decision. Quite obviously this letter could not be considered as part of the record as that term is used in 5 U.S.C. 706 since it did not exist at the time of final agency action. Even more significantly, however, reliance upon the letter permitted the agency to use the "evidence in a way that forecloses an opportunity to offer a contrary presentation." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, supra.*

The reliance by the court of appeals upon the post hoc letter as evidence presents a serious constitutional question which deserves review by this Court.

3. The Decision Below Presents Important Federal Questions Which Have Not Been, But Should Be, Settled by This Court.

Section 6(b) of the Occupational Safety and Health Act (29 U.S.C. 655(b)) is a careful and detailed provision which gives the Secretary of Labor full authority to "promulgate, *modify,* or revoke any occupational safety or health standard" (emphasis supplied), such as the chlorine standard here involved, by following the rulemaking procedures set forth in that section. The Secretary, however, changed the chlorine standard by

invoking the exception to rulemaking contained in 5 U.S.C. 553(b)(B).[4] (13a.)

There are cases, such as *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424, and *American Trucking Assoc.* v. *Frisco Transp. Co.*, 358 U.S. 133, where this Court has held, under the circumstances there involved, that administrative agencies may correct inadvertent clerical or ministerial errors. Both *Seatrain* and *American Trucking*, however, involved orders of the Interstate Commerce Commission granting certificates of public convenience and necessity, issued after adjudicatory proceedings. The orders before the Court affected only the rights of the named individual applicants, and were not in the nature of generally applicable rules or regulations—that is, they were not legislative in nature or of general applicability. The orders were also such that they could not have been reconsidered or altered by subsequent administrative procedures, except to correct errors.

This case involves an OSHA standard that was promulgated in 1971. The standard was legally binding and enforceable, and was relied upon by the chlorine industry in good faith until December 8, 1978. It was said that the change made on December 8, 1978 was merely mechanical in nature, and that it would

---

[4] 5 U.S.C. 553(b)(B) provides an exception to the general rule of notice of proposed rulemaking "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Under a fair reading, this statute does not apply. Notice was clearly not "impracticable", nor can it properly be said to be "contrary to the public interest." That leaves "unnecessary," which is the question at issue, and could hardly be properly resolved without notice and the "public rulemaking proceedings" provided by 5 U.S.C. 553(b).

not "establish, modify or revoke substantive rights and obligations." These statements may be tested in two ways, and both lead to the conclusion that the change by OSHA was, indeed, substantive, and of the sort which section 553(b) requires to be made by appropriate rulemaking procedures.

1. *What standard was in effect between 1971 and 1978?* In 1971, OSHA published a standard which clearly and explicitly provided for 1 ppm TWA as applied to chlorine. As previously indicated, this standard was republished, and codified, without change, over the next four years; and it was used in enforcement proceedings brought by OSHA. It was relied upon by the industry, and remained the published standard for seven and a half years, during which the agency did not suggest at any time that any worker had been adversely affected by the 1 ppm TWA standard.

Is there any doubt that the standard which *was* in effect between 1971 and 1978 was the 1 ppm TWA standard? During this period, can it be supposed that OSHA could have enforced a 1 ppm ceiling standard while the 1 ppm TWA was the outstanding published standard? Yet, the effect of the OSHA position is that the 1 ppm ceiling was the actual standard during this period, because the publication of the 1 ppm TWA standard was a mistake. If this was the case, then the 1 ppm ceiling standard was "the law" during this period. But this was not the situation. During this period, everyone, including OSHA, was relying on the 1 ppm TWA standard, and acting on that reliance.

It seems obvious that the actual standard between 1971 and 1978 was the published standard of 1 ppm TWA. Consequently, a change to 1 ppm ceiling was a modification, and would necessarily affect "substantive

rights and obligations." Thus, the basis for OSHA's action without rulemaking procedures falls away.

2. *Was the action taken in 1978 retroactive?* If the change made in 1978 was simply "mechanical" and did not "establish, modify or revoke substantive rights and obligations," then it must be retroactive—because, obviously enough, if the change made in 1978 did not affect substantive rights, the change must be applicable to prior years as well as to years following the date of the change. Suppose OSHA were now to bring a proceeding seeking forfeiture or penalty because of a violation of the 1 ppm ceiling standard which occurred in 1977, prior to the change. Can it be supposed that OSHA would prevail? Yet, if the conclusion is that the 1978 change is not effective in 1977, it seems to follow that the 1978 change did change the applicable rule, and thus was not really "mechanical" and did in fact "modify or revoke substantive rights and obligations."

Another, and simpler, way to put this point is to conclude, as frequently established in administrative law, that when a published regulation has been enforced for seven and a half years, and has been relied upon by an entire industry during that period, a change in that regulation, for whatever reason, is a matter of substance, and cannot be made without following appropriate rulemaking procedures. This is not only the clear requirement of section 553(b), but it is a sound principle of administrative law. Cf. *United States* v. *Rutherford,* 442 U.S. 544, 554-558; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315; *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 472-473.

A separate, but related, question is also presented. Assuming, *arguendo,* that agencies may correct regulations without rulemaking, what burden of proof must the agency carry to demonstrate that the action is indeed a correction, and not a change in policy?

In *American Trucking Assoc.* v. *Frisco Transp. Co., supra,* 358 U.S. at 146, this Court held that "the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies." The case is silent, however, on the standard of proof to be employed by a reviewing court.

In the decision below, the court of appeals indicated that it was far from convinced that the change in the standard made by OSHA was a correction rather than a change in policy. The court, however, relied upon the familiar test of "substantial evidence on the record as a whole" in affirming the OSHA order. The use of the substantial evidence test was clearly erroneous since there was no rulemaking or adjudicatory record upon which to apply the substantial evidence test. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 414; *Camp* v. *Pitts,* 411 U.S. 138, 140-141. The Court put this clearly in its *Overton Park* opinion when it said (401 U.S. at 414):

> Review under the substantial-evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself . . . or when the agency action is based on a public adjudicatory hearing.

Recent Federal statutes have resulted in a multiplicity of administrative agency regulations which are complex, highly technical, and have a substantial impact upon those regulated. Whether those regulations may be changed without notice and rulemaking procedures on the basis of an agency claim of prior error, and if so what burden of proof the agency must carry to establish that the action is a correction and not a change in policy, are important questions upon which the lower courts and the agencies need guidance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERWIN N. GRISWOLD
1735 Eye Street, N.W.
Washington, D.C. 20006

PAUL M. DONOVAN
1511 K Street, N.W.
Suite 743
Washington, D.C. 20005

Attorneys for Petitioners

Of Counsel:

JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006

LA ROE, WINN & MOERMAN
Suite 743
1511 K Street, N.W.
Washington, D.C. 20005

May 1980

STATUTORY APPENDIX

5 U.S.C. 553

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Section 6(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655(a))

(a) Without regard to chapter 5 of Title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

Section 6(b) of the Occupational Safety and Health Act of 1970
29 U.S.C. 655(b))

(b) The Secretary may by rule promulgate, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health, Education, and Welfare, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health, Education, and Welfare, together with all pertinent factual information developed by the Secretary or the Secretary of Health, Education, and Welfare, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments.

Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place of such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employes with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which

most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employees, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

(6) (A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as practicable. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his pro-

gram for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided,* That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

(B) An application for a temporary order under this paragraph (6) shall contain:

(i) a specification of the standard or portion thereof from which the employer seeks a variance,

(ii) a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,

(iii) a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,

(iv) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and

(v) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

(C) The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health, Education, and Welfare certifies, that such variance is necessary to permit an employer to participate in an experiment approved by him or the Secretary of Health, Education, and Welfare designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available by

the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health, Education, and Welfare, such examinations may be furnished at the expense of the Secretary of Health, Education, and Welfare. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health, Education, and Welfare, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health, Education, and Welfare, may by rule promulgated pursuant to section 553 of Title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, manitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this chapter than the national consensus standard.

Section 6(f) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655(f))

(f) Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein

such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

APPENDIX

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 79-2703

Summary Calendar.*

THE CHLORINE INSTITUTE, INC., et al., *Petitioners,*

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, F. Ray Marshall, Secretary of Labor and Eula Bingham, Assistant Secretary of Labor for O.S.H.A.,

Respondents.

March 7, 1980

La Roe, Winn & Moerman, Paul M. Donovan, Washington, D.C., for petitioners.

John A. Bryson, U.S. Dept. of Labor, Washington, D.C., for respondents.

Petition for Review of an Order of the Occupational Safety and Health Administration.

Before FAY, POLITZ, and ANDERSON, Circuit Judges.

PER CURIAM:

The Chlorine Institute, Inc. petitions for review of an order of the Occupational Safety and Health Administration (OSHA). By order of this court on October 9, 1979, petitioners' motion to stay the OSHA order was granted. Today we remove the stay and reinstate the OSHA order.

This case abounds with examples of bureaucratic ineptness. When the Occupational Safety and Health Act was passed in late 1970,[1] Congress provided that the Secretary

---

* Fed.R.App.P. 34(a); 5th Cir. R. 18.

[1] Occupational Safety and Health Act of 1970, Pub.L.No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-678 (1976)).

of Labor could, for two years from the effective date of April 28, 1971, circumvent the normal rule-making procedures and promulgate as an OSHA standard any "national consensus standard" and "any established Federal standard." 29 U.S.C. § 655(a)(1976).[2] On the effective date, two federal standards existed on occupational exposure to

---

[2] Section 6(a) of the Act, 29 U.S.C. § 655(a) (1976) reads as follows:

> Without regard to chapter 5 of Title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standards, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

"Established Federal standard" and "national consensus standard" are defined as follows:

> (9) The term "national consensus standard" means any occupational safety and health standard or modification thereof which (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.
>
> (10) The term "established Federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on December 29, 1970.

29 U.S.C. § 652(9)-(10) (1976). The Secretary adopted some national consensus standards, 36 Fed.Reg. 10,466 (1971), however, the industry standards in dispute here were not so adopted.

chlorine gas. The first of the two standards was the "Threshold Limit Values of Airborne Contaminants for 1968" of the American Conference of Governmental Industrial Hygienists (ACGIH), which was printed at 41 C.F.R. § 50-204 (1968 standards). The ACGIH standard, adopted by the Secretary of Labor in 1969, included a table listing various gases, vapors, and fumes along with corresponding permissible concentration levels. If the contaminant was preceded by the letter "C," it indicated that the limit was a "ceiling" or maximum exposure amount. Absence of a "C" meant the exposure amount was computed over an eight-hour period as a time-weighted average (TWA). A TWA permits excursions above the limit so long as they are compensated for by corresponding periods below the limit. The 1968 table limited chlorine exposure to one part of chlorine per million parts of air (1 ppm) measured as a ceiling, not as an eight-hour average. This standard applied to industries engaged in the manufacture or production of chlorine products.

The second federal standard on chlorine exposure available to the Secretary in implementing the OHS [*sic*] Act was one concerning construction workers. One day before the OSH Act's effective date, the Secretary's regulations pertaining to the construction industry under the Contract Work Hours and Safety Standards Act (Construction Safety Act) became effective. These regulations adopted the ACGIH guidelines for 1970 (1970 standards). 29 C.F.R. § 1518.55 (now codified at 29 C.F.R. § 1926). On the 1970 tables, chlorine was not preceded by the letter "C," therefore, a time-weighted average was in effect.

Because ACGIH standards did not fall within the definition of "national consensus standard" under the OSH Act, 29 U.S.C. § 652(9) (1976), a ACGIH standard could only be adopted as an "established Federal standard." *Id.* § 655(a). The two existing federal adoptions of ACGIH standards (the 1968 and 1970 tables) conflicted. The 1968 standard,

was relatively strict and allowed only a ceiling amount of 1 ppm chlorine. 41 C.F.R. § 50-204. The more liberal 1970 standard permitted a time-weighted average of chlorine over eight hours. 29 C.F.R. § 1518 (now 29 C.F.R. § 1926).

In choosing between the two conflicting federal standards the Secretary had unequivocal instructions from Congress.

> In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

29 U.S.C. § 655(a) (1976). Despite the clear mandate of the Act, the record is far from clear on which existing federal standard was adopted as the general contaminant level for chlorine.[3] The standard promulgated by OSHA makes reference to both the 1968 and the 1970 ACGIH standards. At 29 C.F.R. § 1910.93, captioned "Air contaminants," the regulation stated it was incorporating the liberal 1970 standards.[4] The table following the section was indeed

---

[3] There is no question that the Secretary adopted the liberal 1970 standard for the construction industry. 29 C.F.R. § 1910. Section 1910.5(c)(1) specifies that specific sections will prevail over general standards. Section 1910.5(e) said that whenever the standard was derived from 41 C.F.R. § 50-204 (the 1968 standards) it was to apply only to manufacturing and supply industries. 36 Fed.Reg. 10,468 (1971). That section was removed from the regulation. See 37 Fed.Reg. 22,104 (1972).

[4] Section 1910.93(a) read as follows:

§ 1910.93 Air contaminants. (Gases, vapors, fumes, dust, and mists.)

(a) Exposures by inhalation, ingestion, skin absorption, or contact to any material or substance (1) at a concentration above those specified in the "Threshold Limit Values of Airborne Contaminants for 1970" of the American Conference of Governmental Industrial Hygienists, listed in Table G-1, except for the American National Standards listed in Table

the 1970 table of permissible exposure levels. The chlorine listing gave a time-weighted average and was identical to the 1970 ACGIH standard previously adopted at 29 C.F.R. § 1518 (now codified at 29 C.F.R. § 1926). Viewed by itself, section 1910.93 clearly adopted the 1970 standard. Problems were created, however, by 29 C.F.R. § 1910.99, the "Sources of standards" section. Section 1910.99 cited the stricter 1968 ACGIH standard, 41 C.F.R. § 50-204.50, as the source for section 1910.93. Obviously a mistake had been made either in section 1910.93 or 1910.99.

Evidently this was not the only mistake the government made. Two and one-half months later, the Secretary published "Miscellaneous Amendments" to the regulation. 36 Fed.Reg. 15,101 (1971). The Secretary stated the public had "pointed up the need for clarifications, corrections, and changes in effective dates of standards." As to section 1910.93, the Secretary stated it had been "revised in its entirety, in the interest of greater intelligibility and accuracy." Section 1910.99 (Sources of standards) was not mentioned. Section 1910.93 was amended to include an explanation of the "C" notation system. Reference to the 1970 standards was removed and many of the values in the table following the section were amended to reflect the 1968 standards. The "C" notations that preceded three entries under the 1968 standards, however, were not added to the regulation. Chlorine was one of these entries. The asterisk noting a 1970 change remained on the table before chlorine. Therefore, although some changes had been made to align the regulation with the stricter 1968 standards, the

---

G-2 of this section and except for values of mineral dusts listed in Table G-3 of this section, and (2) concentrations above those specified in Table G-1, G-2, and G-3 of this section, shall be avoided, or protective equipment shall be provided and used.

36 Fed.Reg. 10.503 (1971). "Chlorine" was not preceded by a "C," but was preceded by an asterisk, which indicated a 1970 addition, or change. *Id.* at 10,504-05.

chlorine entry remained at its looser, 1970 time-weighted average amount.

The regulation was republished again in October, 1972. 37 Fed.Reg. 22,102 (1972). The purpose of the revision was to incorporate changes and correct "typographical and clerical errors." Section 1910.93 again included the 1970 standard for chlorine; section 1910.99 still listed the 1968 standard as the source of section 1910.93.

The two-year limit for passing regulations without resort to normal rule-making procedures passed. The Secretary cited employers for violating the time-weighted average, or 1970, standard. *Secretary of Labor v. FMC Corporation,* 2 OSHC 3216 (1974). In 1976, the National Institute for Occupational Safety and Health, an organization established by the OSH Act, recognized the 1970 1 ppm, TWA standard in a "Criteria Document" and suggested that the standard be changed to a 0.5 ppm, ceiling. On December 8, 1978, seven and one-half years after it promulgated the regulation, the Secretary announced that "[t]he notation 'C,' designating a ceiling exposure limit, was inadvertently omitted" from the chlorine entry and two others. 43 Fed. Reg. 57,601 (1978). The Secretary stated that section 1910.93 (now section 1910.1000) incorporated the 1968 standards by reference, although actually the 1970 standards had been listed in the original section 1910.93. *Id.* at 57,602. The Secretary stated that because the "corrections" did not "establish, modify or revoke substantive rights and obligations," public notice and comment, and normal regulation-making procedures were unnecessary.

After the Chlorine Institute filed comments on February 1, 1979, OSHA issued a stay of the December 8, 1978 "corrections." Deciding that the tables after section 1910.93 were merely "to make it easier for employers and employees to have quick access" to the information and that

1910.99 (now 1910.1499) incorporated the 1968 standards,[5] OSHA lifted its stay on July 17, 1979, and made the effective date of the "corrections" October 15, 1979. The Chlorine Institute petitioned this court for review and petitioned OSHA for a stay of its order. OSHA denied the petition on September 13, 1979. R. 444-48. In denying the stay, OSHA cited its conclusion that the 1968 standards provide the greatest protection for employees. *Id.* at 445. The court stayed the effectiveness of the corrections on October 9, 1979, pending review of the OSHA order.

The Secretary argues that omission of the "C" from the table was merely a ministerial mistake, which the Secretary can now correct without resort to its regulation-making procedures. The courts have long recognized that administrative agencies may correct inadvertent, ministerial errors. *American Trucking Ass'ns, Inc. v. Frisco Transportation, Co.*, 358 U.S. 133, 79 S.Ct. 170, 3 L.Ed.2d 172 (1958) (ICC certificate); *United States v. Seatrain Lines, Inc.*, 329 U.S. 424, 67 S.Ct. 435, 91 L.Ed. 396 (1947) (ICC certificate); *Bell v. Hearne*, 60 U.S. (19 How.) 252, 15 L.

---

[5] The revised section 1910.93 reads as follows:

An employee's exposure to any material listed in table G-1, G-2, or G-3 of this section shall be limited in accordance with the requirements of the following paragraphs of this section.

(a) Table G-1:

(1) Material with names preceded by "C"—Ceiling Values. An employee's exposure to any material in Table G-1, the name of which is preceded by a "C" (e.g., C Boron trifluoride), shall at no time exceed the ceiling value for that material in the table.

(2) Other materials—8 hour time weighted averages. An employee's exposure to any material in table G-1, the name of which is not preceded by "C", in any 8-hour work shift of a 40-hour work week, shall not exceed the 8-hour time weighted average given for that material in the table.

Ed. 614 (1857) (title to land).[6] Not only must the error be inadvertent and ministerial, but the power to correct "may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies." *American Trucking Ass'ns v. Frisco Transportation Co.*, 358 U.S. at 146, 79 S.Ct. at 177.

Much commends the Chlorine Institute's position that the December 8, 1978 announcement reflects not a ministerial "correction," but a change in policy. Seven and one-half years elapsed before this clerical error earned administrative attention. Although OSHA argues it was the Secretary's intent to adopt the 1968 standards from the start, in as early as 1974 OSHA went to the trouble of citing employers under the more liberal 1970 standards without beginning the mechanisms for either correcting the error or modifying the regulation. The Institute argues it strains credulity to claim that OSHA erred not only in the original promulgation of the regulation, but also in the subsequent amendments and corrections of it. The Institute points to the history of the use of "ceiling" as opposed to time-weighted averages for chlorine exposure as proof that the Secretary chose 1970 standards, because the 1968 ceil-

---

[6] Neither party discusses whether the power to correct ministerial errors should be extended to regulations. It seems debate should be possible on whether the power to correct errors applies in a situation such as this one. Prior Supreme Court cases involving the correction of errors by administrative agencies have affected only a few persons individually granted by the agency some right, such as I.C.C. certificates or title to land. Here a general regulation is applied against all those in the chlorine industry. A change in this type of regulation has repercussions more extensive in scope. Reliance on the "erroneous" regulation is more widespread, especially after seven years. Unlike prior cases, OSHA also has other means for changing the status of the ruling it can comply with the normal procedures for promulgating regulations. 29 U.S.C. § 655(b) (1976).

ing standard was an anomaly which was quickly changed.[7] The petitioner also asserts that the eleventh hour promulgation of the 1970 standards under the Construction Safety Act indicates the Secretary's intent to utilize the 1970 standards as the "established Federal standards" in this regulation. In essence, the Institute argues the ministerial error was not the omission of "C" from the table, but the incorrect listing of the 1968 standard (41 C.F.R. § 50-204) as the source of 29 C.F.R. § 1910.93.

Although difficult, it is not impossible to believe OSHA took over seven years to uncover an error such as this. The chlorine standard is one of nearly 300 adopted by OSHA in 1971. Between thirty and forty discrepancies were corrected. While the 1978 correction could appear to be a policy change prompted by the NIOSH suggestions, the chlorine listing is not the only error being corrected: the "C" was omitted on two others, and one substance was completely omitted. Because the 1968 standard was stricter, the error was not one which employers would raise when cited for violations of the 1970 standard. The Secretary argues that no conflict really exists in the standards; the liberal 1970 standard applied to construction workers and the stricter 1968 standards to manufacturing workers.[8] The timely adoption of the 1970 standards does not indicate an intent to incorporate them in section 1910.93. Those standards were included in the regulations, but only for the construction industry. 29 C.F.R. § 1910.12. The Secretary

---

[7] The ACGIH standards placed a ceiling on chlorine exposure for only two years, 1967 and 1968. R. at 4, 18. ACGIH changes remain as trial limits for at least two years. *See* R. at 9, 37. In 1968, the ACGIH noted its intention to remove the ceiling in 1969, R. at 18, 22, which was done. R. at 32. The Chlorine Institute argues the Secretary was merely adopting the latest industry standards when promulgating 40 C.F.R. § 50-204, which adopted the 1968 standard in 1969, and 29 C.F.R. § 1518, which adopted the 1970 standard in 1971.

[8] *See* note 2 *supra*.

asserts that even if a conflict exists between the standards, OSHA is required to "promulgate the standard which assures the greatest protection." 29 U.S.C. § 655(a) (1976). OSHA has found that ceiling limits provide greater protection than TWAs and the record discloses substantial evidence in support of this conclusion.[9] Finally, the Secretary points to the sources section as clear evidence of an intent to adopt the 1968 standards.

Clearly a clerical mistake exists in one of the sections. While we certainly do not condone OSHA's inattentiveness and tardiness, substantial evidence exists to show that the error is in 1910.93 not 1910.99. For the Secretary to have done otherwise would have been a transgression of the precise instructions given by Congress.[10] We therefore remove the stay and uphold the Secretary's actions.

AFFIRMED.

---

[9] It is interesting that part of OSHA's concern over TWAs stems from the Secretary of Labor's incomplete adoption of the 1968 ACGIH standards in 41 C.F.R. § 50-204.50. The Assistant Secretary for OSHA noted that a TWA would allow excursions to the dangerous level of 30 ppm for ten minutes. R. 446. This possibility is created because 41 C.F.R. § 50-204.50 does not set upper limits on 8-hour TWA excursions. The only limit is that the sum of all the number of minutes of exposure times the actual concentration levels cannot exceed the product of the exposure limit in the table and 480 (8 hours times 60). For chlorine, the table lists 1 ppm; therefore, employees could theoretically be subjected to one minute at a concentration of 480 ppm. The ACGIH standards, however, suggest 3 ppm as the upper limit on TWA chlorine excursions. *See* R.15, 27, 44, 57.

[10] Normally Congress delegates to the administrators involved broad discretion in implementing regulations. In this instance Congress chose a different route. If more than one standard existed, only one could be adopted. That one was to be "the standard which assures the greatest protection of the safety or health of the affected employees." 29 U.S.C. § 655(a).

[4510-26-M]

Title 29—Labor

CHAPTER XVII—OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR

PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

Air Contaminants Tables; Corrections

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Final rule; corrections.

SUMMARY: This document contains corrections to the tables of exposure limits for air contaminants in 29 CFR 1910.-1000. These corrections are being published to avoid any confusion as to the content of the section.

EFFECTIVE DATE: December 8, 1978.

FOR FURTHER INFORMATION CONTACT:

Mr. Louis Polito, Office of Compliance Programing, Division of Occupational Health Programing, 3rd Street and Constitution Avenue, N.W., Room N-3608, Washington, D.C. 20210 (Tel. (202) 523-8043).

SUPPLEMENTARY INFORMATION: The Occupational Safety and Health Administration (OSHA) standards for occupational exposure to air contaminants (gases, vapors, fumes, dust, and mists) were first published as 29 CFR 1910.93, Tables G-1, G-2 and G-3 (36 FR 10503, May 29, 1971, as revised by 36 FR 15101, August 13, 1971). These standards were subsequently moved to a new subpart, Subpart Z-Toxic and Hazardous Substances, and recodified at 29 CFR 1910.1000, Tables Z-1, Z-2, and Z-3 (40 FR 23072, May 28, 1975).

These standards were promulgated under section 6(a) of the Occupational Safety and Health Act of 1970 (the

Act) (84 Stat. 1593; 29 U.S.C. 655(a)), which required the Secretary of Labor to adopt, within two years of the Act's effective date (April 28, 1971), any national consensus standard, and any established Federal standard, unless he determined that the promulgation of such a standard would not result in improved safety or health for specifically designated employees.

In promulgating these standards, which are described more fully below, OSHA adopted regulations originally issued under the Walsh Healey Public Contracts Act (41 U.S.C. 35 et seq.) as established Federal standards, and certain standards issued by the American National Standards Institute (ANSI) as national consensus standards.

There are a number of extraneous entries, inadvertent omissions and typographical errors in these standards, as they currently appear. Many of the typographical errors and inadvertent omissions which occurred in the transcription of these standards have been recognized by employers and industrial hygienists. OSHA has received many inquiries concerning these errors and many requests that the standards be clarified and that the errors be corrected. Therefore, for the guidance and convenience of the public, OSHA is correcting the tables to remove ambiguities and correct possible confusion. As discussed more fully below, these corrections are of a technical or clarifying nature, and conform 29 CFR 1910.1000 to the established Federal standards and national consensus standards which OSHA adopted under section 6(a) of the Act. These corrections do not establish, modify or revoke substantive rights and obligations.

OSHA has determined that notice of these corrections and public procedure thereon is not necessary under section 4 of the Administrative Procedure Act (5 U.S.C. 553), or under section 6 of the Occupational Safety and Health Act. In making these corrections, the only questions considered were whether OSHA had accurately transcribed

the source documents for these standards and whether errors have occurred in subsequent republications or recodifications of these tables. Since these determinations are essentially mechanical, notice and public procedure thereon are unnecessary and impracticable within the meaning of 5 U.S.C. 553(b)(3) [*sic*] (B).

Nor does section 6 of the Occupational Safety and Health Act require notice and public comment on these corrections. They do not establish, modify or revoke substantive rights and obligations. No useful purpose would thus be served by notice and public procedure. Therefore, under 29 CFR 1911.5, good cause is found to publish these corrections without prior notice or public procedure thereon. For the same reasons, good cause is found to make these changes effective immediately upon publication in the FEDERAL REGISTER.

Some of the more important errors being corrected, and their origins, are discussed briefly below.

Table Z-1. The exposure limits listed for substances in Table Z-1 of 29 CFR 1910.1000 were originally adopted under the Walsh-Healey Public Contracts Act (41 U.S.C. 35 et seq.). These Walsh-Healey safety and health standards incorporated by reference the Threshold Limit Values of Airborne Contaminants for 1968 of the American Conference of Governmental Industrial Hygienists (ACGIH), published at 34 FR 7946, 7953, May 20, 1969, and codified in 41 CFR 50-204.50. The Secretary of Labor determined that these Walsh-Healey standards were "established Federal standards" within the meaning of section 3(10) of the Act and therefore adopted them as OSHA standards under section 6(a) of the Act (36 FR 10466, 10504, May 29, 1971).

As stated above, the 1968 ACGIH threshold limit values were merely incorporated by reference in the Walsh-Healey standards. In adopting these established Federal

standards, OSHA decided to transcribe the material incorporated by refetrence, specifically listing the substances and their exposure limits, in order to make it easier for employers and employees to have quick access to this information. The May 29, 1971 printing, however, inadvertently and incorrectly listed the 1970 ACGIH threshold limit values rather than the 1968 ACGIH threshold limit values which were incorporated in the Walsh-Healey standards. This error was partially corrected by a subsequent FEDERAL REGISTER document which printed the 1968 values (36 FR 15101, August 13, 1971). However, two substances from the 1970 edition of the Threshold Limit Values of Airborne Contaminants were inadvertently retained: Propargy alcohol and RDX. Also, the footnote for Oil mist was inadvertently retained. The notation "C", designating a ceiling exposure limit, was inadvertently omitted for three substances: Chlorine, Nitrogen dioxide, and Nitroglycerin.

In addition, in transcribing the 1968 ACGIH threshold limit values, OSHA inadvertently omitted dibutyl phosphate and its exposure limit of 1 ppm and 5 mg/M ^{3}. In accord with the Act's requirement that the Secretary promulgate any national consensus standard and any established Federal standard, unless the Secretary determined that the promulgation of such a standard would not contribute to the safety and health of employees (section 6(a)). OSHA intended to adopt permissible exposure limits for all the substances regulated under Walsh-Healey except for those substances for which OSHA expressly decided to adopt national consensus standards. There was no national consensus standard on dibutyl phosphate at the time. Accordingly, the list is corrected by adding dibutyl phosphate to the air contaminant tables. This conforms Table Z-1 to the established Federal standards which OSHA adopted.

In several instances specific substances were covered by the national consensus standard and an established

Federal standard. The Secretary chose to promulgate the ANSI standard in lieu of the established Federal standard for a variety of substances. In some cases, however, the references to the established Federal standards were not properly deleted. These deletions are accomplished in this correction document.

The exposure limit for Parathion, which originally had been printed correctly as 0.1 mg/M ^{3} (36 FR 10505, May 29, 1971), was later misprinted as 0.11 mg/M ^{3} (36 FR 15103, August 13, 1971). The exposure limit for Ronnel inadvertently was not corrected to its 1968 ACGIH value of 15 mg/M ^{3}. These errors are hereby corrected.

While the August 13, 1971, document showed the correct permissible exposure limit for Stoddard solvent as expressed in parts per million (ppm), the permissible exposure limit as expressed in milligrams per cubic meter (mg/M ^{3}) was erroneously printed as 2950 rather than 2900. In a subsequent republication of OSHA regulations (37 FR 22102, October 18, 1972), the exposure limit for Tetramethyl lead, which had been properly corrected to 0.075 mg/M ^{3} (36 FR 15101, 15103, August 13, 1971) was printed erroneously as 0.07 mg/M ^{3} (37 FR 22141, October 18, 1972). These and several other typographical errors are corrected in this document.

Table Z-2. The exposure limits for substances listed in 29 CFR 1910.1000, Table Z-2, were originally based upon several standards adopted by the American National Standards Institute (ANSI Z-37 series). The Secretary of Labor determined that these standards were "national consensus standards" within the meaning of section 3(9) of the Act and therefore adopted them as OSHA standards under section 6(a) of the Act (36 FR 10466, May 29, 1971).

The May 29, 1971, printing in the FEDERAL REGISTER erroneously omitted some of the acceptable ceiling con-

centrations and all of the peaks or excursions from the exposure limits for the covered substances. The error was partially corrected in the August 13, 1971 FEDERAL REGISTER (36 FR 15101). However, the acceptable ceiling concentration for Cadmium fume misprinted as 3 mg/M ^{3}; the correct value is 0.3 mg/M ^{3}. This error has been generally recognized by employers and industrial hygienists. (See, e.g., CCH, Employment Safety and Health Guide, Volume 2, ¶ 7600.6). In addition, the corrected ceiling concentration was subsequently printed in the NIOSH criteria document. Occupational Exposure to Cadmium, and in OSHA's review and evaluation of that criteria document (42 FR 5434, 5436, January 28, 1977). While the May 29, 1971 printing correctly listed the source document for Methylene chloride as ANSI Z37.23-1969, a typographical error in the August 1971 correction document listed the source document as ANSI Z37.3-1969. This document also corrects this error.

Table Z-3. The exposure limits listed for substances in Table Z-3 of 29 CFR 1910.1000 were originally adopted under the Walsh-Healey Public Contracts Act, and codified at 41 CFR 50-204.50 et seq. The Secretary of Labor determined that these Walsh-Healey standards were 'established Federal standards'' within the meaning of section 3(10) of the Act and therefore adopted them as OSHA standards under section 6(a) of the Act (36 FR 10466, 10506, May 26, 1971). In 1972, the Secretary of Labor adopted a comprehensive asbestos standard and deleted asbestos and its exposure limits from Table Z-3 (29 CFR 1910.1001; 37 FR 11320, June 7, 1972). Footnote ''j'' to Table Z-3, dealing with asbestos, was inadvertently retained. This document corrects this error.

Standards Organizations (§ *1910-1500*). The National Fire Protection Association was erroneously included as a source for standards in Subpart Z, when the tables were recodified (40 FR 23073, May 28, 1975). This document corrects that error.

Accordingly, pursuant to sections 6 and 8 of the Act (84 Stat. 1593, 1600; 29 U.S.C. 655, 657) section 4 of the Administrative Procedure Act (5 U.S.C. 553), Secretary of Labor's Order No. 8-76 (41 FR 25059), and 29 CFR 1911.5, Title 29 Code of Federal Regulations, § 1910.1000 and § 1910.1500 are corrected as set forth below.

These amendments are effective December 8, 1978.

Signed at Washington, D.C. this 30th day of November, 1978.

EULA BINGHAM,
Assistant Secretary of Labor.

§ 1910.1000 [Amended]

I. Title 29 CFR § 1910.1000 is corrected as follows:

A. Table Z-1:

1. The asterisks (single or double) in front of the entries "C Allylglycidyl ether (AGE)"; "Ammonia"; "Butyl mercaptain"; "Camphor"; "Chlorine"; "Octane"; Oil mist, mineral"; "Pentane"; and "Stoddard solvent" are deleted.

2. The entry "Bisphenol A, see Diglycidyl ether" is deleted.

3. In the entry for "Camphor," the number "2" is deleted under the heading "ppm" and the number "2" is added under the heading "mg/M ^{3}.

4. In the entry for "Chlorine," the notation "C" is added before the word, "Chlorine."

5. In the entry for "DDVP," the words "See Dichlorvos" are deleted, and the notation "Skin" is added; the number "1" is added under the heading "mg/M ^{3}."

6. The entry "Dichlorvos (DDVP)—Skin" is deleted.

7. The entry "Dibutyl phosphate" is added in the substance column after "Diborane"; the number "1" is entered in the "p.p.m." column, and "5" is entered in the "mg/M ^{3}" column.

8. The entry "Ethylene dibromide, see 1.2-Dibromoethane" is deleted.

9. The entry "Ethylene dichloride, see 1.2-Dichloroethane" is deleted.

10. In the entry for "Nitrogen dioxide," the notation "C" is added before the word, "Nitrogen."

11. In the entry for "Nitroglycerin," the notation "C" is added before the word ,"Nitroglycerin."

12. In the entry for "Oil mist," the footnote is deleted from the column "mg/M ^{3}."

13. In the entry for "Parathion," the number under the heading "mg/M ^{3}" is corrected to "0.1."

14. The entry "Propargyl alcohol—Skin—1" is deleted.

15. The entry "RDX-Skin—1.5" is deleted.

16. In the entry for "Ronnel," the number under the heading "mg/M ^{3}" is corrected to "15."

17. In the entry for "Stoddard solvent," the number under the heading "mg/M ^{3}" is corrected to "2.900."

18. The entry "Tetrachloroethylene, see Perchloroethylene" is deleted.

19. In the entry for "Tetramethyl lead," the number under the heading "mg/M ^{3}" is corrected to "0.075."

20. The footnote to Table Z-1, "1970 Addition" is deleted.

21. The footnote to Table Z-1, "As sampled by method that does not collect vapor" is deleted.

22. The footnote to Table Z-1, "For control at general room air, biologic monitoring is essential for personnel control," is deleted.

B. Table Z-2:

1. In the entry for "Cadmium fume," the entry under the heading "acceptable ceiling concentration" is corrected to read "0.3 mg/M ^{3}."

2. In the entry for "Formaldehyde," the words "10 ppm" which appear directly after "5 ppm" in the "Acceptable ceiling concentration" column are moved to the column headed "Concentration."

3. In the entry for "Methylene chloride," the source document is corrected to "Z37.23-1969."

4. Table Z-2 is rearranged so that the substances appear in alphabetical order. The term "do," standing for "ditto," is deleted wherever it appears in Table Z-2 and the appropriate numerical value is substituted.

C. Table Z-3:

The footnote to Table Z-3, "j As determined by the membrane filter method at 430X phase contrast magnification," is deleted.

§ 1910.1500 [Amended]

II. Title 29 CFR § 1910.1500 is corrected as follows:

In 29 CFR 1910.1500, the reference "National Fire Protection Association, 470 Atlantic Avenue, Boston, Massachusetts, 02210" is deleted.

(Sec. 6, 8(g), 84 Stat. 1593, 1600; 29 U.S.C. 655, 657, Secretary of Labor's Order No. 8-76 (41 FR 25059), 29 CFR Part 1911, 5 U.S.C. 553).

[FR Doc. 78-34365 Filed 12-7-78; 8:45 am]

Title 29—Labor

CHAPTER XVII—OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR

PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

[Docket No. H-074]

OCCUPATIONAL EXPOSURE TO CHLORINE

Administrative Stay; Request for Comments and Information

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Administrative Stay of Final Rule; Request for Comments and Information.

SUMMARY: This action stays the correction, from a time weighted average to a ceiling, of the permissible exposure level for chlorine which is contained in Table Z-1 of 29 CFR 1910.1000. Comments are requested on the appropriate permissible exposure level for occupational exposure to chlorine.

DATE: The information requested in this notice must be submitted on or before April 9, 1979.

ADDRESS: The comments and information requested in this notice should be submitted to the Docket Officer, Docket No. H-074, Room S6212, U.S. Department of Labor, OSHA, Third Street and Constitution Avenue NW, Washington, D.C. 20210, (202-523-7894).

FOR FURTHER INFORMATION CONTACT.

Ms. Flo H. Ryer, Office of Special Standards Programs, Room S-3663, Occupational Safety and Health Administration, Third Street and Constitution Avenue, NW., Washington, D.C. 20210 (202-523-7174).

SUPPLEMENTARY INFORMATION: On December 8, 1978, the Occupational Safety and Health Administration published in the FEDERAL REGISTER a final rule which corrected a number of errors and inadvertent omissions in the tables of exposure limits for airborne contaminants contained in 29 CFR 1910.1000, Table Z-1, Z-2, and Z-3 (43 FR 57601). Included in the corrections was the insertion of a "C," designating a ceiling limit, in front of the listing for chlorine in Table Z-1 (correction No. 4, 43 FR 57603). This action corrected the permissible exposure limit for chlorine from 1 part of chlorine per million parts of air (1 ppm) as an eight hour time weighted average (TWA), which would have permitted exposures above 1 ppm as long as the 8-hour average did not exceed 1 ppm, to a ceiling for chlorine of 1 ppm.

Following publication of the correction document, a number of comments were received suggesting that a permissible exposure level for chlorine of 1 ppm as a TWA was sufficiently protective of workers' safety and health. There have also been claims of industry reliance on the 1 ppm level as a TWA. On the other hand, a criteria document on chlorine prepared by the National Institute for Occupational Safety and Health recommends that worker exposure to chlorine should be no greater than .5 ppm measured over any fifteen minute period. ("NIOSH Criteria for a Recommended Standard . . . Occupational Exposure to Chlorine," U.S. Department of Health, Education, and Welfare, Public Health Service, Center for Disease Control, National Institute for Occupational Safety and Health, May 1976).

Interested persons are invited to submit written data, views, and arguments concerning the appropriate permissible exposure level for chlorine. Comments are also requested on the NIOSH recommendations, including the data, relied upon in the criteria document. The NIOSH criteria document including the references relied upon

therein are available for review and copying at the OSHA Docket Office, Room S6212, U.S. Department of Labor, Third Street and Constitution Avenue, NW., Washington, D.C. 20210. All communications should be submitted in quadruplicate, by April 9, 1979 to the Docket Officer, Docket No. H-074, Room S6212, U.S. Department of Labor, Third Street and Constitution Avenue, NW., Washington, D.C. 20210 (202-523-7894).

In view of the questions which have been raised and in conjunction with this request for comments and information, OSHA considers it appropriate to administratively stay the correction of the permissible exposure limit for chlorine from a time-weighted average to a ceiling, pending a review and evaluation of all comments received. Accordingly, the correction to a 1 ppm ceiling for chlorine is hereby stayed, and the 1 ppm time-weighted average for chlorine will remain in effect, pending this consideration.

This document was prepared under the direction of Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, Third Street and Constitution Avenue, N.W., Washington, D.C. 20210.

(Sec. 6, Pub. L. 91-596, 84 Stat. 1593; (29 U.S.C. 655) 29 CFR Part 1911; Secretary of Labor Order No. 8-76 (41 FR 25059).)

Signed at Washington, D.C., this 1st day of February 1979.

EULA BINGHAM,
Assistant Secretary of Labor.

[FR Doc. 79-4101 Filed 2-5-79; 8:45 am]

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

Occupational Safety and Health Standards; Occupational Exposure to Chlorine; Lifting of Administrative Stay

AGENCY: Occupational Safety and Health Administration, Department of Labor.

ACTION: Lifting of Administrative Stay of Final Rule.

SUMMARY: This notice reinstates the 1 ppm ceiling exposure limit for chlorine (Table Z-1 of 29 CFR 1910.1000). After careful evaluation of the comments submitted in response to the Federal Register notice of February 8, 1979 (44 FR 7140) which stayed the 1 ppm ceiling exposure limit for chlorine. OSHA has concluded that a permanent suspension of the ceiling limit is unwarranted and that the stay issued on that date should be lifted.

EFFECTIVE DATE: October 15, 1979.

FOR FURTHER INFORMATION CONTACT: Flo H. Ryer, Director, Office of Special Standards Programs, Room N-3683, Occupational Safety and Health Administration, Third Street and Constitution Avenue, N.W., Washington, D.C. 20210 (202-532-7174).

SUPPLEMENTARY INFORMATION: On December 8, 1978, the Occupational Safety and Health Administration (OSHA) published a final rule in the Federal Register which corrected a number of errors and omissions in the tables of exposure limits for airborne contaminants contained in 29 CFR 1910.1000. Tables Z-1, Z-2, and Z-3 (43 FR 57601). Included in the corrections was the insertion of a "C", designating a ceiling limit, in front of the listing for chlorine in Table Z-1 (correction number 4, 43 FR 57603). This action corrected the permissible exposure limit for chlorine from 1 part chlorine per million parts

of air (1 ppm) as an eight-hour time weighted average (TWA) to a ceiling exposure limit of 1 ppm.

On February 8, 1979, OSHA administratively stayed the correction of the permissible exposure limit for chlorine (44 FR 7140, 7141). Thirty written comments were received in response to the administrative stay and request for comments and information. These comments addressed the following issues:

(1) Whether OSHA adopted a ceiling or a TWA permissible exposure limit for chlorine under section 6(a) of the Act;

(2) the documentation used to support the exposure limit recommended by NIOSH.

A discussion of these issues is presented in the following section.

1. The exposure limits listed for substances in Table Z-1 of 29 CFR 1910.1000 were originally adopted under the Walsh-Healey Public Contracts Act (41 U.S.C. 35 *et seq.*). These Walsh-Healey safety and health standards incorporated by reference the Threshold Limit Values (TLVs) of Airborne Contaminants for 1968 of the American Conference of Governmental Industrial Hygienists (ACGIH), published at 34 FR 7946, 7953, May 20, 1969, and codified in 41 CFR 50-204.50. The Secretary of Labor determined that these Walsh-Healey standards were "established Federal standards" within the meaning of section 3(10) of the Occupational Safety and Health Act of 1970 (the Act) and therefore adopted them as OSHA standards under section 6(a) of the Act (36 FR 10466, 10504, May 29, 1971). See 29 CFR 1910.1499.

As stated above, the 1968 ACGIH threshold limit values were merely incorporated by reference in the Walsh-Healey standards. In adopting these established Federal standards, OSHA decided to transcribe the material incorpo-

rated by reference, specifically listing the substances and their exposure limits in order to make it easier for employers and employees to have quick access to this information. The May 29, 1971 printing, however, incorrectly listed the 1970 ACGIH threshold limit values rather than the 1968 ACGIH threshold limit values which were incorporated in the Walsh-Healey standards. This error was partially corrected by a subsequent Federal Register document which printed the 1968 values (36 FR 15101, August 13, 1971). In the transcription several errors occurred; for example, the notation "C", designating a celing exposure limit for chlorine was omitted.

Comments submitted by interested labor unions (e.g., comment nos. 13 and 17) contended that the OSHA standard for exposure to chlorine must conform to the established Federal standards adopted by OSHA in 1971. Comments submitted by commercial interests (e.g., comment nos. 2, 7, and 15) stated that the 1 ppm TWA value for chlorine is appropriate because this value was accepted by ACGIH in 1970 and served as the basis for the present OSHA standard.

The source of standards section, found at 29 CFR 1910.-1499 (formerly 29 CFR 1910.99) indicates that standards promulgated under the Walsh-Healey Act are the basis for the values listed in Table Z-1. The Walsh-Healey standards incorporated the 1968 ACGIH TLVs which in the case of chlorine was a ceiling of 1 ppm. This was the established federal standard which OSHA intended to adopt under section 6(a) of the Act. The December 8 correction merely conformed the listing for chlorine with that in the source document.

2. Several comments (e.g., comment nos. 6, 7, 15 and 19) addressed the NIOSH recommendations and the supporting documentation in the criteria document. These comments alleged serious deficiencies in the data supporting the NIOSH recommended level of worker exposure to

chlorine. In view of these assertions, OSHA will continue to evaluate all comments concerning the recommendations made by NIOSH in the criteria document and additional documentation as it becomes available before deciding whether to issue a proposed rule to amend the chlorine standard.

Based upon evaluation of the comments and information submitted in response to the February 8 notice, the Assistant Secretary has concluded that the 1 ppm ceiling limit contained in the December 8, 1978 correction document should be reinstated as the proper permissible exposure limit for chlorine at this time. Therefore the administrative stay of the permissible exposure limit for chlorine is hereby rescinded and the 1 ppm ceiling limit is reinstated. A ninety day delayed effective date is deemed appropriate in this instance. To the extent that some employers may have relied on the permissible exposure level for chlorine being a TWA of 1 ppm, this extra time will permit them to come into compliance with the corrected pemissible exposure level. Therefore, this action will become effective on October 15, 1979.

This document was prepared under the direction of Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, Third Street and Constitution Avenue N.W., Washington, D.C. 20210.

(Sec. 6, Pub. L. 91-596, 84 Stat. 1593 (29 U.S.C. 655), 29 CFR Part 1911; Secretary of Labor Order No. 8-78 (41 FR 25059).)

Signed at Washington, D.C. this 11th day of July, 1979.

Eula Bingham,
Assistant Secretary of Labor.

[FR Doc. 79-20008 Filed 7-16-79; 8:45 a.m.]

BILLING CODE 45 10-26-M

U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration
WASHINGTON, D.C. 20210

Office of the Assistant Secretary

September 13, 1979

Paul M. Donovan, Esq.
LaRoe, Winn & Moerman
Suite 743
1511 K Street, N.W.
Washington, D.C. 20005

Dear Mr. Donovan:

This letter is in response to your Motion for Stay Pending Judicial Review dated July 23, 1979 which you filed on behalf of The Chlorine Institute, Inc. requesting that the Occupational Safety and Health Administration stay the correction of the permissible exposure level for Chlorine contained in Table Z-1 of 29 CFR 1910.1000. Specifically, you requested that the reinstatement of the 1 ppm ceiling exposure limit for chlorine be stayed pending the decision of the United States Court of Appeals for the Fifth Circuit in the case of *The Chlorine Institute et al* v. *Occupational Safety and Health Administration et. al,* No. 79-2703.

Your request and the comments submitted on behalf of the Chlorine Institute have been carefully reviewed and evaluated. For the reasons set out below I hereby deny your request for an administrative stay of the chlorine correction pending the outcome of judicial review.

As you know, the Occupational Safety and Health Act (the Act) gave the Secretary of Labor the authority to promulgate established federal standards and national consensus standards for a period of two years after the effective date of the Act. An established federal standard is defined in § 3(10) of the Act as "any operative occupa-

tional safety and health standard established by an agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act.'' The Threshold Limit Values of Airborne Contaminants for 1968 of the American Conference of Governmental Industrial Hygienists (ACGIH) were incorporated by reference in safety and health standards promulgated under the Walsh-Healey Public Contracts Act (see 34 FR 7946, 7953, 5/20/69; codified in 41 CFR 50-204.50). In 1968 the ACGIH had a ceiling limit of 1 ppm for chlorine. The Secretary of Labor determined that these Walsh-Healey standards were ''established Federal standards'' within the meaning of section 3(10) of the Occupational Safety and Health Act and therefore adopted them as OSHA standards under section 6(a) of the Act (36 FR 19466, 10504, 5/29/71; 36 FR 15101, 8/13/71). Certain errors inadvertently occurred in the transcription of the threshold limit values for the approximately 400 substances included in the standard. These errors, including the correction of the listing for chlorine from a time weighted average to a ceiling, were corrected in the Federal Register document published December 8, 1979 (43 F.R. 57603).

You assert that there were in fact *two* established Federal standards for chlorine in May of 1971 and that OSHA in fact promulgated the federal standard for chlorine established in regulations promulgated under the Contract Work Hours and Safety Standards Act, i.e. a 1 ppm time weighted average. Therefore you contend that the December 8 correction was an agency attempt to modify the standard without rulemaking. Your contention is rebutted by the following facts among others. OSHA intended to adopt the threshold limit values for airborne contaminants which had been adopted under the Walsh-Healey Act. This is shown by the source of standards section (29 CFR 1910.99, subsequently recodified as 29 CFR 1910.1499) which clearly shows the source of the standards in Table Z-1 (formerly Table G-1 of 29 CFR 1910.93) of 29 CFR

1910.1000 to be the Walsh-Healey standards, not the standards promulgated under the Contract Work Hours and Safety Standards Act (Construction Safety Act).[1] In addition, section 6(a) of the Act indicates that if there is a conflict between any established Federal standards or consensus standards "the Secretary shall promulgate the standard which assures the greatest protection of the safety and health of the affected employees." As discussed further below, a ceiling rather than a time weighted average (TWA) permissible exposure level for chlorine clearly assures the greatest protection of the safety and health of the affected employees.

You also assert that no person will be adversely affected if the stay is granted. It appears that every working man and woman who is exposed to chlorine in his or her workplace would be potentially adversely affected if the stay were granted. While it is certainly inappropriate to examine the evidence here in the same manner as if this were a rulemaking proceeding conducted pursuant to section 6(b) of the Act, a brief look at some of the available studies clearly belies your contention that "there is a total lack of harm to any person if the 1 ppm time weighted average remains in effect pending review."

Chlorine is an intensely irritating gas with tissue damaging properties. Chlorine irritates the eyes, the skin, the mucous membranes, and the respiratory system. When inhaled, chlorine affects the surface tissues of the respiratory system (i.e., bronchi, bronchioles, and pulmonary alveoli). Acute exposure may produce bronchial spasms, bronchitis, and toxic hemorrhagic pulmonary edema.

Symptoms of severe exposure to chlorine include anxiety, nausea, vomiting, coughing, chest pain, and difficulty in

---

[1] The numerous changes in the Table published on August 13 (36 F.R. 15101, 8/13/71) further reflect the Agency's intention to adopt the Walsh-Healey standards.

breathing. While impairment of health from long-term exposure to chlorine at low concentrations has not been clearly demonstrated, numerous studies have been shown that there is a definite pulmonary response to acute chlorine exposure. A number of studies have suggested that impairment of respiratory function may persist for several months following acute exposure to chlorine. Other studies have reported irregularities in cardiac function, suggesting that the pulmonary effects of acute chlorine exposure may result in a potentially dangerous stress on the heart.

Time weighted average (TWA) exposures permit excursions above the limit, if they are balanced by equivalent excursions below the limit during the work day. TWA limits are not appropriate when high concentrations of a substance for brief periods may result in acute poisoning or injury to the exposed employee. For these substances, such as the irritant gases, a ceiling or maximum allowable exposure is needed to prevent health effects which have a rapid onset following a single exposure.

A 1 ppm 8 hour-TWA chlorine standard would permit potentially dangerous short term excursions above the 1 ppm level without exceeding the 8 hour time weighted average exposure. For example, employee exposure in excess of 30 ppm for 15 minutes would be permitted by a 1 ppm TWA permissible exposure limit. This is particularly significant in view of the fact that 25 ppm has been established by NIOSH as the level which is immediately dangerous to life and health (IDLH).[2]

Even low levels of exposure for short periods of time have been shown to produce serious effects. For example, one study discussed in the NIOSH criteria document showed that exposure to approximately 4 ppm of chlorine

---

[2] Even assuming a relatively low exposure level, such as an average exposure of .5 ppm, employees could be exposed to 48 ppm for 5 minutes without exceeding a 1 ppm 8 hour TWA.

for a short period produced a coughing stimulus which lasted for eighteen hours. Actually, due to varying individual susceptibility, a 1 ppm standard, whether it be a TWA or a ceiling, will not protect all employees from eye and respiratory effects. Studies have shown that individuals vary in their response to chlorine at concentrations ranging from 0.1 to 5 ppm. Painful or annoying irritation of the eyes and upper respiratory tract has been reported to occur in some employees at concentrations significantly less than 1 ppm (i.e., 0.3-0.5 ppm). While some employees will be able to work without irritation in chlorine concentrations of 1 to 3 ppm, other employees will experience cough, headache, or shortness of breath. A number of researchers have found that symptoms of irritation usually increase with increasing length of exposure to chlorine at a given concentration. The experience of eye or pulmonary irritation is not just a matter of employee discomfort. Such irritation may effect the employee's safety and health by increasing the likelihood of injury from accidents and increasing susceptability to the harmful effects of other toxic agents in the workplace.

While the study sponsored by the Chlorine Institute is a step in the right direction, the results must be viewed as somewhat preliminary. Regardless of the flaws in the study, of which there are many, the study actually seems to support the Secretary's position that employees would be adversely affected if the correction were stayed. There was a significant decrease in certain indices of pulmonary function (e.g. FEV and FVC) when extremely healthy hand picked young volunteers (all under the age of 30) were exposed to 2 ppm for 4 hours. If the PEL for chlorine were a TWA of 1 ppm, workers could be exposed to 2 ppm for 4 hours without exceeding the PEL. Moreover, it should be noted that the test atmospheres to which the study volunteers were exposed were steady state atmospheres of .5, 1 or 2 ppm of chlorine, the type of atmospheres consistent with having a ceiling standard (i.e. no

excursions). Indeed the atmospheric fluctuations in the workplace chlorine level suggested by the Institute's vigorous opposition to the correction were notably absent during the experiment. In addition, the study is significant in what it does not show. For example, the study does not attempt to ascertain the results of exposure to 3 or 4 or even 10 ppm for short periods such as 30 minutes or one hour, exposures clearly permissible if the PEL is a TWA of 1 ppm.

Finally, it must be noted that you have not shown that you will be irreparably harmed if the stay is not granted. While cost alone is rarely considered to constitute irreparable harm, your statement as to the cost of compliance must be viewed in the conclusory and vague context in which it was presented. While you state that your members are meeting a PEL of 1 ppm measured as an eight hour TWA, you do not show how many are presently controlling to a ceiling of 1 ppm or what the actual exposures are.

We have made every effort to mitigate any "unfair" burden that the correction may have on you or your members. From the date of the correction, through the various reconsiderations to the effective date you will have had nine months in which to make any necessary adjustments of working conditions. For this reason and for the reasons discussed above and in the Federal Register document published July 17, 1979 (44 F.R. 41427), I do not feel it would be appropriate to grant your motion for a stay.

Sincerely,

/s/ EULA BINGHAM
Eula Bingham
Assistant Secretary of Labor

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 79-2703

Summary Calendar

D.C. Docket No. H-074

THE CHLORINE INSTITUTE, INC., ET AL.,
Petitioners,

versus

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, F. RAY MARSHALL, Secretary of Labor and EULA BINGHAM, Assistant Secretary of Labor for O.S.H.A.,
Respondents.

Petition for Review of an Order of the Occupational Safety and Health Administration

Before FAY, POLITZ and ANDERSON, Circuit Judges.

JUDGMENT

This cause came to be heard on the petition of The Chlorine Institute, Inc., Et Al., for review of an order of the Occupational Safety and Health Administration and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of an order of the Occupational Safety and Health Administration in this cause be, and the same is hereby affirmed;

IT IS FURTHER ORDERED that the petitioners pay to the respondents the costs on appeal to be taxed by the Clerk of this Court.

March 7, 1980

Issued as Mandate: April 24, 1980.

A true copy

Test GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ SUSAN B. VAUGHN
Deputy

New Orleans, Louisiana
April 24, 1980

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-2703

THE CHLORINE INSTITUTE, INC., ET AL.
Petitioners,

versus

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, F. RAY MARSHALL, Secretary of Labor and EULA BINGHAM, Assistant Secretary of Labor for O.S.H.A.,
Respondents.

On Petition for Review of An Order of the Occupational Safety and Health Administration

ON PETITIONS FOR REHEARING

(APRIL 7, 1980)

Before FAY, POLITZ and ANDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

/s/ FELIX FAY
United States Circuit Judge

Form 703-3

Supreme Court, U. S.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-1763

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE CHLORINE INSTITUTE INC., ET AL., PETITIONERS

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

CARIN A. CLAUSS
Solicitor of Labor

BENJAMIN W. MINTZ
Associate Solicitor for Occupational Safety and Health

ALLEN H. FELDMAN
Counsel for Appellate Litigation

JOHN A. BRYSON
Assistant Counsel for Appellate Litigation
Department of Labor
Washington, D.C. 20210

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	8
Conclusion	13

CITATIONS

Cases:

American Trucking Ass'n v. *Frisco Transportation Co.*, 358 U.S. 133	7, 10
Department of Energy v. *Mobil Oil Corp.*, cert. denied, No. 79-1365 (May 12, 1980)	11
Dixon v. *United States*, 381 U.S. 68	12
Enfield v. *Kleppe*, 566 F.2d 1139	12
Herndon v. *Georgia*, 295 U.S. 441	11
Industrial Union Department, AFL-CIO v. *Hodgson*, 499 F.2d 467	7
Lawn v. *United States*, 355 U.S. 339	11
Manhattan General Equipment Co. v. *Commissioner*, 297 U.S. 129	12
United States v. *Lovasco*, 431 U.S. 783	11

Statutes and regulations:

Contract Work Hours and Safety Standards Act, 40 U.S.C. 333	2
Occupational Safety and Health Act of 1970, 29 U.S.C. 553 *et seq.*:	
Section 3(9), 29 U.S.C. 652(9)	2
Section 3(10), 29 U.S.C. 652(10)	2

Statutes and regulations—Continued Page

Section 6(a), 29 U.S.C. 655(a) ..2, 4, 6, 8, 9
Section 6(b), 29 U.S.C. 655(b) 2, 7, 8, 10, 11
Section 6(b)(6)(A), 29 U.S.C. 655 (b)(6)(A) 13
Section 6(f), 29 U.S.C. 655(f) 6

Walsh-Healey Act, 41 U.S.C. 35 *et seq.* 2
5 U.S.C. 553 11
5 U.S.C. 553(b)(3)(B) and (d)(3) 12
29 C.F.R. Part 1910 4
29 C.F.R. 1910.12 ..... 4, 8
29 C.F.R. 1910.12-1910.131 4
29 C.F.R. 1910.21-1910.331 4
29 C.F.R. 1910.93 ..... 4, 5
29 C.F.R. 1910.93(a) 4
29 C.F.R. 1910.99 4
29 C.F.R. 1910.1000 5
29 C.F.R. Part 1518 2
29 C.F.R. Part 1926 2
41 C.F.R. 50-204 2
41 C.F.R. 50-204.50 5

Miscellaneous:

36 Fed. Reg. (1971):

p. 10466 4
p. 10469 4
pp. 10504-10505 4
p. 10523 4

Miscellaneous—Continued

	Page
pp. 15101-15102	4, 5
p. 25232	2
40 Fed. Reg. 23072, 23073 (1975)	5
43 Fed. Reg. 57601 (1978)	5
44 Fed. Reg. 7141 (1979)	5

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1763

THE CHLORINE INSTITUTE INC., ET AL., PETITIONERS

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 613 F.2d 120.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1980 (Pet. App. 33a-34a), and petitions for rehearing were denied on April 7, 1980 (Pet. App. 35a). The petition for a writ of certiorari was filed on May 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly determined that the Secretary of Labor's promulgation of an occupational health standard for chlorine contained an inadvertent error and accordingly permitted the Secretary to make the correction without compliance with the rulemaking procedures of 29 U.S.C. 655(b).

STATEMENT

1. Section 6(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 655(a), granted temporary authority to the Secretary of Labor to promulgate, "as soon as practicable" and without advance notice or opportunity to comment, any standard previously established under a federal statute or any standard developed by a nationally recognized private standard-setting organization as a mandatory OSHA standard. See 29 U.S.C. 652(9) and (10). Among the established federal standards available to the Secretary for promulgation were hundreds of standards then in effect under the Walsh-Healey Act, 41 U.S.C. 35 *et seq.*, governing public contractors, and the Contract Work Hours and Safety Standards Act, 40 U.S.C. 333 (the "Construction Safety Act"), governing federally funded construction work.[1] Both stanudards regulated employee

[1] The Walsh-Healey standards were codified at 41 C.F.R. 50-204 and the Construction Safety Act standards were codified at 29 C.F.R. Part 1518. The latter standards were subsequently recodified at 29 C.F.R. Part 1926. 36 Fed. Reg. 25232 (1971).

exposure to chlorine but the quantitative exposure limit was different under each standard. Although both standards incorporated by reference the numerical limitations recommended by the American Conference of Governmental Industrial Hygienists ("ACGIH"), a private organization that annually publishes a table of Threshold Limit Values for hundreds of toxic substances, the Walsh-Healey standards promulgated in 1969 used the 1968 ACGIH list while the Construction Safety Act standards promulgated in 1971 used the 1970 ACGIH list. The 1968 and 1970 lists were substantially similar except for the values for approximately 40 substances, including chlorine. The 1968 list specified a ceiling concentration for chlorine, that is, exposure could not at any time exceed one part per million parts of air ("1 ppm"). This specification was made by inserting a "C" (for ceiling) before the word "chlorine" (R. 16, 18).[2] The 1970 ACGIH list specified only a time-weighted average (TWA) of 1 ppm, that is, exposure could exceed 1 ppm so long as there were compensating exposures under 1 ppm to achieve an average of 1 ppm over a normal work day. This specification was made by simply omitting the "C" before the word "chlorine" (R. 45, 47).

2. On May 29, 1971, the Secretary adopted numerous established federal standards and national consensus standards as mandatory OSHA standards

---

[2] "R." refers to the certified portions of the record filed with the court of appeals. A copy of the record is currently lodged with the Clerk of this Court.

under 29 U.S.C. 655(a). 29 C.F.R. Part 1910 (36 Fed. Reg. 10466 (1971). 29 C.F.R. 1910.12 adopted the Construction Safety Act standards, including a TWA value for chlorine, but limited their application to construction work. 36 Fed. Reg. 10469 (1971). 29 C.F.R. 1910.21-1910.331 adopted the so-called "general industry" standards for application in all industries. 29 C.F.R. 1910.93 regulated exposure to numerous air contaminants. The regulations expressly stated (29 C.F.R. 1910.99; 36 Fed. Reg. 10523 (1971)) that the source for the group of standards including the chlorine standard was "41 C.F.R. 50-204.50," which incorporated the 1968 ACGIH list (specifying 1 ppm as a ceiling limit for chlorine). For the convenience of affected persons, the Secretary reprinted the list of contaminants and their respective limits in 29 C.F.R. 1910.93. By mistake, however, the 1970 list, not the 1968 list, was reprinted. This introduced a number of errors, one of which was that the entry for chlorine omitted the "C" code that indicated the permissive exposure limit was a "ceiling" rather than a TWA. See 36 Fed. Reg. 10504-10505 (1971).

The Secretary soon discovered that the wrong list had been reproduced and attempted to correct this mistake three months later by issuing a revised version of 29 C.F.R. 1910.93. 36 Fed. Reg. 15101-15102 (1971). This eliminated any reference to the ACGIH list and published a corrected table more closely corresponding to the 1968 ACGIH list.[3] By further

---

[3] Originally, 29 C.F.R. 1910.93(a) specified that concentrations "above those specified in the 'Threshold Limit Values of

error, however, a few discrepancies, including the entry for chlorine, remained uncorrected. As a result, 29 C.F.R. 1910.93 still omitted the "C" code before the word "chlorine" and thus failed to state that the 1 ppm limit was a ceiling, not an average, limitation.

On December 8, 1978, the Secretary published further corrections, specifically stating that the original publication in 1971 had erroneously published the 1970 ACGIH list and that the August 1971 correction had not completely substituted the 1968 values. Among about 27 other changes, the Secretary corrected the entry for chlorine by inserting the "C" code to show, as 41 C.F.R. 50-204.50 had required, that the 1 ppm standard was a ceiling, not a TWA. 43 Fed. Reg. 57601 (1978) (Pet. App. 11a-19a).[4]

Although these corrections were made effective immediately, the Secretary suspended the chlorine correction on February 6, 1979, and invited comment thereon and on employee exposure to chlorine (44 Fed. Reg. 7141 (1979); Pet. App. 20a-22a). Petitioners and others responded by arguing that there had been no mistake in the original promulgation

---

Airborne Contaminants for 1970' of the [ACGIH]" had to be avoided by feasible equipment and controls. The correction omitted any reference to the 1970 list. 36 Fed. Reg. 15101-15102 (1971).

[4] Originally, the list was reprinted as "Table G-1" in 29 C.F.R. 1910.93. 36 Fed. Reg. 10504 (1971). In 1975, it was redesignated as "Table Z-1" in 29 C.F.R. 1910.1000, the agency's recodification of 29 C.F.R. 1910.93. See 40 Fed. Reg. 23072, 23073 (1975).

and that a TWA was as protective as a ceiling (R. 129-140, 220-226). Several unions representing affected employees maintained that the ceiling value adopted under the Walsh-Healey standards was the only lawful value because the Act specifically required the Secretary "[i]n the event of conflict among [established federal standards], the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees." 29 U.S.C. 655(a). The unions contended that a ceiling value provided more protection because only that restriction could prevent the danger of short-term exposure to high concentrations of chlorine (R. 227-253). After evaluating these comments, the Secretary terminated the suspension and the 1 ppm ceiling limit became effective (Pet. App. 23a-26a).

3. Pursuant to 29 U.S.C. 655(f), petitioners then sought judicial review of the correction of the standard in the court of appeals.[5] The only issue presented

---

[5] After the Secretary lifted the temporary suspension of the chlorine correction, petitioners applied to the agency for a stay pending judicial review. The Secretary denied a stay pending judicial review because a ceiling value would provide greater protection to employees and because the harm flowing from a stay of the correction would outweigh the burdens of compliance incurred by the employers (Pet. App. 27a-32a). Petitioners then sought and were granted a stay by the court of appeals pending review by that court.

After the court of appeals had upheld the Secretary's actions and removed its stay, petitioners sought a stay in this Court. The Secretary did not oppose a stay, pending the disposition of the certiorari petition, of the requirement for implementation of feasible engineering controls and work practices to achieve a ceiling exposure limit of 1 ppm. How-

by petitioners was whether the Secretary's original promulgation of the chlorine standard was in fact a mistake. Petitioners conceded (Br. 12) that if the standard had been published in error, the Secretary had inherent authority to make the correction without proceeding under 29 U.S.C. 655(b).[6] See *American Trucking Ass'n* v. *Frisco Transportation Co.*, 358 U.S. 133 (1958). Petitioners contended, however, that the original standard had not been a mistake and therefore that the Secretary was required to follow the rulemaking procedures of 29 U.S.C. 655(b) in making any change.

The court of appeals concluded, based upon a number of factors, that there was substantial evidence to support the Secretary's determination that an inadvertent error had been made and that the 1978 amendment was merely a correction (Pet. App. 1a-10a). First, the court of appeals noted, the source-of-standards section of the general-industry regulations specifically listed the 1968 standard as the source for chlorine. Second, chlorine was not the only substance as to which the Secretary had erred; there

---

ever, the Secretary opposed, and on May 19, 1980, this Court denied, a stay of employers' obligation to provide effective respirators to employees exposed to chlorine concentrations in excess of 1 ppm.

[6] See also Pet. App. 8a n.6. 29 U.S.C. 655(b) generally provides for notice and comment procedures, characteristic of informal rulemaking, as well as a hearing upon request, whenever the Secretary promulgates, modifies or revokes an occupational safety and health standard. *See Industrial Union Department, AFL-CIO* v. *Hodgson*, 499 F.2d 467, 472 (D.C. Cir. 1974).

were between 30 and 40 errors in the original promulgation that the Secretary had sought to correct, and a number of these errors (*e.g.*, the omission of the "C" notation for two other substances, as well as the complete omission of any standard for one substance) had, like chlorine, taken seven and one-half years to correct. Third, because the 1968 standard was stricter, the error was not one that employers would have raised in enforcement proceedings. Fourth, the 1970 standard was adopted for the construction industry alone in a different section of the regulations, 29 C.F.R. 1910.12. Finally, the court noted that under Section 6(a) of the Act, 29 U.S.C. 655(a), the Secretary, in the event of conflict between preexisting standards, was required to adopt "the standard which assures the greatest protection of the safety and health of the affected employees." In the court's view, adoption of the 1968 standard was therefore the only action consistent with this statutory mandate (Pet. App. 9a-10a).

ARGUMENT

1. The decision of the court of appeals is correct. Petitioners conceded below (Br. 12) that, in circumstances such as those presented here, "administrative agencies may correct inadvertent ministerial errors." Petitioners contended only that the 1971 omission of the ceiling code had not been such a mistake but had been a deliberate policy choice that could be modified only through the rulemaking procedures of 29 U.S.C. 655(b). The court of ap-

peals reviewed the circumstances supporting the Secretary's claim of error and correctly sustained the claim. This is essentially a factual issue that does not warrant review by the Court.

Petitioners contend (Pet. 8-10), however, that in sustaining the Secretary's position that the 1971 omission had been inadvertent, the court of appeals improperly relied upon extra-record evidence showing that a ceiling is more protective than a TWA limitation. As mentioned above, one of several grounds offered for the court's conclusion that a mistake had occurred was that under 29 U.S.C. 655 (a) the Secretary was required to adopt the more stringent of conflicting standards and that the ceiling was more protective than the TWA limitation.

The conclusion that a ceiling limit is more protective than a TWA limit is simply a matter of unassailable good sense. A TWA limit cannot possibly provide greater protection than a ceiling limit because, while both permit identical excursions *below* the exposure limit, only the TWA allows excursions *above* the limit. In practice, therefore, ceiling limits are more protective by eliminating such excess exposures.[7] Petitioners also overlook the fact that this

---

[7] Petitioners argue (Pet. 10 n.3) that it is possible that a ceiling is *less* protective than a TWA limitation because it would be possible under a 1 ppm ceiling limitation to have a continuous exposure of 1 ppm over a normal work day while a TWA standard of 1 ppm "may have a much lower average exposure for most of the period" in order to compensate for excursions above 1 ppm. However, under a ceiling limitation, the excursions above 1 ppm would be totally eliminated and

was only one of a number of bases for the court's decision (see pages 7-8, *supra*).

2. For the first time, petitioners challenge (Pet. 12-14) the Secretary's authority to correct the error in the chlorine standard without instituting full-scale rulemaking procedures under 29 U.S.C. 655(b). Contrary to their position in the court of appeals, petitioners now dispute the applicability of this Court's decision in *American Trucking Ass'n* v. *Frisco Transportation Co.*, 358 U.S. 133 (1958), to rulemaking.

---

the excursions below 1 ppm would be unchanged—with the result that the average exposure would be less.

Comments submitted in response to the Secretary's invitation to comment on the suspension of the chlorine amendment further explain why a ceiling limitation is more protective than a TWA limitation. The United Paperworkers International Union remarked (R. 233):

> Many of the industrial situations linked in the literature to adverse health effects, could have occurred, and could occur today, without necessarily violating a time-weighted average concentration of 1-ppm. Two cases-in-point are those described in the studies by McCord and by Ferris and associates, both of which were apparently relied upon fairly heavily to document the ACGIH limits.
>
> The study of Rupp and Henschler, upon which ACGIH apparently also relied, describes adverse effects from exposures which could very easily occur without violating a 1-ppm TWA limit. In fact, it appears fairly certain that *none* of the test subjects who experienced adverse effects in the Rupp and Henschler study *were* exposed to an 8-hour time-weighted average of 1 ppm or more on the day they were experiencing those adverse effects.
>
> We have detailed the severe adverse effects on employees from exposure to chlorine in concentrations greater than 1 ppm in our memorandum in opposition to petitioner's application for a stay.

This contention is similar to one of the issues presented in *Department of Energy* v. *Mobil Oil Corp.*, cert. denied, No. 79-1365 (May 12, 1980), concerning the authority of DOE to issue a corrective amendment to certain rules without reinstituting rulemaking procedures. However, the Court declined to review the issue in *Mobil*, and there is no more reason to grant review here. Indeed, this issue was not even advanced by petitioners below (see Pet. App. 8a n.6). Inasmuch as there are no "exceptional circumstances" warranting a departure from the Court's normal practice, the issue may not now be considered by the Court.[8]

---

[8] *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958). Petitioners did not raise the issue in their petition for rehearing in the court of appeals. A separate petition for rehearing filed by PPG Industries, Inc., argued that any amendment to the chlorine standard that substantially revised the substantive impact of the standard could only be issued pursuant to the rulemaking procedures of 29 U.S.C. 655(b). This argument had not been made previously by any party to the review proceeding. The court of appeals denied the petitions without comment (Pet. App. 35a). *See United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977). Cf. *Herndon* v. *Georgia*, 295 U.S. 441, 443 (1935). (We have lodged both petitions for rehearing and the briefs below with the Clerk of this Court.)

In any event, since the amendment was a correction and not a "modification" within the meaning of 29 U.S.C. 655(b), it is clear that the Secretary complied with all procedural requirements in exercising his power to correct the standard. First, as we argued in *Mobil*, such a correction is merely a continuation of a valid rulemaking proceeding and may be accomplished without notice and comment under 5 U.S.C. 553. Second, even if 5 U.S.C. 553 is applicable to such corrections, notice and an opportunity to comment were given when the Secretary postponed the effectiveness of the correction pending comment (Pet. App. 20a-22a). Third, the correc-

Petitioners' assertion (Pet. 12) that they have relied on the omission of the ceiling code in the chlorine standard does not improve their argument. First, the source-of-standard section in the regulations put petitioners on notice from the outset that the limitation adopted in 1971 was the 1968 ceiling limitation. In light of the contradiction on the face of the regulation, there was no basis for any reasonable reliance on the omission of the "C" code before the word chlorine in the 1971 promulgation. Second, petitioners were not entitled to rely on a regulation or interpretation that is inconsistent with a statutory mandate. See *Dixon* v. *United States*, 381 U.S. 68, 74-76 (1965); *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134 (1936); *Enfield* v. *Kleppe*, 566 F.2d 1139, 1142-1143 (10th Cir. 1977). As the court of appeals concluded (Pet. App. 10a), the promulgation of a TWA limit for chlorine "would have been a transgression of the precise instructions given by Congress" because it is less protective than a ceiling limitation. Third, the licensee in *American Trucking Association* also might have claimed reliance on the uncorrected certificate, because it had operated unrestricted service for approximately two years before the ICC initiated proceedings to correct the error. This factor, however, did not alter this Court's judgment that the inadvertent error could be corrected without instituting new proceedings. Fourth, the

---

tion itself was accompanied by a finding that "good cause" existed to publish the correction without prior notice and public comment thereon (Pet. App. 13a). See 5 U.S.C. 553(b)(3)(B) and (d)(3).

Secretary has made the correction at issue in this case prospective only and permitted a 90-day delay in its effectiveness to permit employers to come into compliance with the ceiling limit.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CARIN A. CLAUSS
Solicitor of Labor

BENJAMIN W. MINTZ
Associate Solicitor for
Occupational Safety and Health

ALLEN H. FELDMAN
Counsel for Appellate Litigation

JOHN A. BRYSON
Assistant Counsel for
Appellate Litigation
Department of Labor

MAY 1980

---

[9] Any employer who cannot meet the ceiling by the new effective date may apply for a temporary variance under Section 6(b)(6)(A) of the Act, 29 U.S.C. 655(b)(6)(A).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 321049 332

Supreme Court, U. S.
FILED
JUN 13 1980
MICHAEL RODAK, JR., CLERK

No. 79-1763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE CHLORINE INSTITUTE, INC., *et al.*,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR THE PETITIONERS

ERWIN N. GRISWOLD
PAUL M. DONOVAN
Attorneys for Petitioners

Of Counsel:

JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006

LA ROE, WINN & MOERMAN
Suite 743
1511 K Street, N.W.
Washington, D.C. 20005

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

1. An Agency Order Must Be Upheld, If At All, On The Same Basis Articulated In The Order By The Agency Itself 2

2. Respondents' Reliance Upon DOE v. Mobil Oil Corporation Is Misplaced 3

Conclusion 5

CITATIONS

CASES:

FPC v. *Texaco,* 417 U.S. 380, 397 2

Mobil Oil Corporation v. *DOE,* 610 F.2d 796 (TECA, 1979) certiorari denied May 12, 1980, No. 79-1365 3

Secretary of Labor v. *FMC Corporation,* 2 OSHC 3216 (1974) 5

STATUTES:

5 U.S.C. 553(b)(B) 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1763

THE CHLORINE INSTITUTE, INC., *et al.*,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR THE PETITIONERS

The brief in opposition contends that heavy, if not exclusive, reliance by the court of appeals upon extra-record evidence and upon post-hoc rationalization of agency counsel is harmless. It is further contended that administrative agencies may "correct" their regulations without rulemaking after seven and one-half years of reasonable reliance by affected parties. These contentions present substantial issues in administrative law which should be clarified by a decision of this Court.

1. An Agency Order Must Be Upheld, If At All, On The Same Basis Articulated In The Order By The Agency Itself.

The decision of the court of appeals is based primarily upon a conclusion that a ceiling standard for chlorine provides greater protection to employees than does a time-weighted average standard. The brief in opposition says that this conclusion is "simply a matter of unassailable good sense." (Br. 9.) This is a far cry from a finding by the agency, based on evidence. It wholly overlooks the fact that there was no evidence before the agency on this question, and the conclusion was never drawn by the agency. It was a post-hoc rationalization of agency counsel first raised on review.

In this regard, the conclusion of the court of appeals was drawn in direct conflict with the holding in *FPC* v. *Texaco,* 417 U.S. 380, 397, and the holdings in the numerous other decisions of this Court, and other circuits, cited in the petition. (Pet. 8-10.)

Similarly, the court of appeals decision held:

> OSHA has found that ceiling limits provide greater protection than TWAs and the record discloses substantial evidence in support of this conclusion. (Pet. App. 10a.)

The plain fact is, however, that no such finding or conclusion was ever made by OSHA. The "substantial evidence" cited by the court was a letter written by an Assistant Secretary of Labor after the petition for review was filed in the court of appeals. (Pet. 27a-32a.)

The brief in opposition seeks to rationalize, post hoc, not only the agency order, but the court of appeals decision as well. The contention is that the *court of appeals'* conclusion that ceiling limits provide greater

protection than TWAs need not rest on the extra record materials cited by the court as substantial evidence, but can be rested, as already observed, on "unassailable good sense." (Br. 9.) This, of course, is simply a statement that a crucial fact may be found without any evidence in the record. In any event, the conclusion was that of the court and of agency counsel. The agency never made such a determination, and had no basis for doing so.

2. Respondents' Reliance Upon *DOE* v. *Mobil Oil Corporation* Is Misplaced.

The brief in opposition relies upon the refusal of this Court to grant certiorari in *Mobil Oil Corporation* v. *DOE,* 610 F.2d 796 (TECA, 1979), *certiorari denied,* May 12, 1980, No. 79-1365. Respondents' reliance upon this action is misplaced for two reasons.

First, the holding of the Temporary Emergency Court of Appeals there involved was that an administrative agency could not, under 5 U.S.C. 533(b)(B), change its regulations without rulemaking by claiming that an error had occurred in the initial promulgation. To the extent that the *Mobil* case is relevant here, a clear conflict exists between the TECA and the court of appeals decision here at issue. This conflict presents a question which deserves review by this Court.

Second, in *Mobil* the hiatus between the initial promulgation on April 3 and "correction" on April 30 was a brief 27 days. In the instant case the hiatus was seven and one-half years. In the petition for a writ of certiorari in *Mobil,* the Solicitor General stated:

> We do not contend that such amendments may be made after a relatively long delay or after reliance is reasonably placed on the rules as originally

> promulgated. At some point, the agency must be deemed to have intended to adopt its actual statement of policy, and those who have relied thereon ought to have an opportunity to comment on any revisions. (Pet. 15, fn. 12.)

The instant case presents just such a situation of long and reasonable reliance.[1]

The brief in opposition also contends that petitioners had no basis for reasonable reliance upon the standard for chlorine as promulgated. It is suggested that a cryptic reference to the source of the standard[2] should have put petitioners on notice that the regulation was erroneous.

---

[1] Respondents state that petitioners did not raise the issue of the agency's authority to change its regulations, after long delay and reasonable reliance, without rulemaking, on the grounds that an error had occurred in the initial promulgation. Specifically, it is stated: "Petitioners did not raise the issue in their petition for rehearing in the court of appeals." (Br. 11, fn. 8.) This statement is incorrect. Even a cursory glance at the petition for rehearing (which has been filed by the Government with the Clerk of this Court) reveals that the issue of "good cause" under 5 U.S.C. 553(b)(B) after widespread reliance for seven and one-half years was extensively argued. (Petition for Rehearing, 4-5, 12-14.)

[2] As indicated at p. 4 of the Government's brief, this source was indicated as "41 C.F.R. 50-204.50," hardly a model of clarity. Moreover, if one had pursued this reference, he might quite rationally have concluded that it was in fact the "error" in the regulation, which was in fact wholly clear and explicit as to the standard adopted.

If petitioners were unreasonable in their reliance upon the regulation, they were not alone in their folly. The Secretary of Labor relied upon the time-weighted average standard in citing one employer for its violation. *Secretary of Labor* v. *FMC Corporation,* 2 OSHC 3216 (1974). In addition, the National Institute of Occupational Safety and Health relied upon the time-weighted average standard in its criteria document of May, 1976. (R. 301.)[3] Clearly, the long reliance by petitioners upon the time-weighted average standard was completely reasonable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERWIN N. GRISWOLD
PAUL M. DONOVAN
Attorneys for Petitioners

Of Counsel:

JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006

LA ROE, WINN & MOERMAN
Suite 743
1511 K Street, N.W.
Washington, D.C. 20005

June, 1980

---

[3] "R." refers to the certified portions of the record filed with the court of appeals. A copy of the record is currently lodged with the Clerk of this Court.